**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GARY L. WILEY** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 205,235 |
| **DILLON COMPANIES, INC.** | ) | |
| Respondent | ) | |
| Self-Insured | ) | |

## ORDER

Claimant appeals from the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 20, 1998. Oral argument was held in Wichita, Kansas, on November 13, 1998.

### APPEARANCES

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent appeared by its attorney, Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

### RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

1) What is the appropriate date of accident in this litigation?

2) What, if any, is the nature and extent of claimant's injury and/or disability?

3) Are the medical records of George Lucas, M.D., and Michael Estivo, M.D., admissible as evidence in this matter?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant worked as a night shift stocker for respondent for a period of several years. His duties included separating groceries to either side of the aisles, unloading the groceries from the boxes, and stocking the shelves. Claimant began developing problems with his hands and fingers in 1994. Claimant was diagnosed with tendinitis and locking and trigger fingers of the little, ring and middle fingers of the right hand, and the middle and ring fingers of the left hand. Claimant was referred to Dr. J. Mark Melhorn, an orthopedic surgeon, for examination, evaluation and treatment of his complaints. Claimant was first referred to Dr. Melhorn on November 14, 1994, at which time Dr. Melhorn's diagnosis was "right greater than left hand/wrist painful - tendinitis type component; and complains of locking ring and little fingers, right and left." Dr. Melhorn treated claimant conservatively for a period of time, including splints for his upper extremities and non-steroidal anti-inflammatories. The conservative treatment proved unsuccessful, and claimant underwent surgery for the right little finger on March 27, 1995. Claimant was then returned to work for a short period of time at light duty, followed by a return to his regular employment. Dr. Melhorn assessed claimant a 3.25 percent functional impairment to the right little finger after this surgery.

Claimant continued working for respondent through 1995 as a stocker. He began developing additional problems in his ring and little fingers of the right hand, and underwent surgery under Dr. Melhorn on September 18, 1995. After the surgery, claimant was again returned to work for a brief light-duty period, followed by regular employment. Dr. Melhorn assessed claimant a 3.95 percent functional impairment for each finger which equated to a right hand functional impairment of 2 percent. Dr. Melhorn testified claimant's right little finger impairment was unchanged as a result of the surgery.

Following this second surgery, claimant again returned to work for respondent as a stocker, and continued on his regular duties. Claimant developed additional problems on his left hand, and on March 11, 1996, underwent a third surgery, this time to the left middle and ring fingers. After the surgery, claimant returned to work at light duty for a period of time, and ultimately returned to his regular employment. Claimant was assessed a 2.4 percent functional impairment of the left hand following these surgeries.

The dispute in this matter is twofold. First, on what date or dates did claimant suffer accidental injury while employed with respondent? Second, what is the nature and extent of claimant's injury and/or disability? Claimant argues simultaneous bilateral microtraumas, resulting in a whole body impairment, which entitles claimant to a work disability. Respondent, on the other hand, contends Dr. Melhorn's testimony is specific that claimant suffered three scheduled injuries, leading up to the individual surgeries, and he should be compensated for the scheduled injuries only. The Administrative Law Judge

considered the medical testimony of Dr. Melhorn to be the most credible, and awarded claimant three scheduled injuries based upon the functional impairments provided by Dr. Melhorn.

The medical testimony of Dr. Melhorn must be considered in light of the notations contained in Dr. Melhorn's medical records. While Dr. Melhorn is adamant in his testimony that the claimant suffered three scheduled injuries, and that there was no simultaneous development or exacerbation of claimant's conditions, the medical notes in Dr. Melhorn's file contradict these assertions. When claimant first began treatment with Dr. Melhorn, claimant's symptoms were bilateral, although claimant's right hand symptoms were greater than those on the left. Claimant was noted to have tendinitis and locking of the ring and little fingers of both right and left hands. Claimant underwent extensive treatment for both upper extremities. It is noted that claimant underwent surgeries for the right and left upper extremities at different times. However, this does not prohibit a finding of simultaneous aggravation. When dealing with simultaneous aggravations of the upper extremities, Kansas has a lengthy history of litigation. In Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986), the Kansas Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. This holding was further solidified by the Supreme Court in Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997). In considering the medical testimony and the medical evidence of Dr. Melhorn, the Appeals Board finds that claimant has proven that his accidental injury occurred as a result of a series of microtraumas over a period of several years, with simultaneous aggravation occurring from claimant's work duties as a night stocker. Therefore, respondent's contention that this is a series of scheduled injuries is rejected, and the Award of the Administrative Law Judge in this regard is reversed.

The Appeals Board must next decide the appropriate date of accident under these circumstances. This matter has been filed, pled, and litigated as a single event, with only one docket number. A single date of accident involving a series of microtrauma circumstances is found appropriate.

When dealing with dates of accidents involving microtrauma injuries, several recent Kansas appellate decisions must be considered. In Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), the Kansas Court of Appeals established a "bright line rule" for carpal tunnel injuries. The Court of Appeals held the claimant's last day worked as the appropriate date of accident or date of occurrence. This rule was somewhat diluted by the Court of Appeals in Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). In Condon, the Court was asked to analyze a situation where the claimant did not reach a point where she could no longer do her job as a result of microtrauma injuries, but continued having symptoms until claimant's last day of work when she was laid off. In analyzing the appropriate date of accident, the Court considered, but rejected, a second option found in 1B Larson, The Law of Workmen's

Compensation, § 39.50 (1992), which discusses the onset of pain which necessitates medical attention as an appropriate injury date, where a microtrauma gradual injury is involved. The Court of Appeals acknowledged that repetitive microtrauma injuries defy attempts to determine a precise date of accident. Nevertheless, a single date was necessary for the computation of a permanent disability award.

The Appeals Board finds this circumstance to be more analogous to Condon than Berry. Here, claimant continued working for respondent up to the dates he underwent the three surgeries, and thereafter returned to work with respondent at his regular job. Claimant's last day worked in June 1996 was not associated with his injuries, but was instead connected with claimant's desire to obtain other employment. Therefore, the Appeals Board finds that the appropriate date of accident in this instance would be March 11, 1996, the last day claimant worked prior to undergoing the final surgery by the hands of Dr. Melhorn.

The Appeals Board was also asked to consider whether the medical reports of Dr. George Lucas and Dr. Michael Estivo should be considered. Dr. Estivo's report was the result of an unauthorized medical examination, not court-ordered. Under K.S.A. 44-519, this report cannot be considered as evidence, absent the doctor's testimony. As Dr. Estivo did not testify in this matter, his report will be excluded.

Dr. Lucas's report of October 21, 1996, was obtained as a result of the Court's order of August 26, 1996, which required the independent medical examination by Dr. Lucas, pursuant to K.S.A. 44-516 which states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct.

K.A.R. 51-9-6 allows that, if a neutral physician is appointed, then the written report of that neutral physician shall be made a part of the record of hearings. Either party is then granted the right to cross-examine the neutral physician.

However, K.S.A. 44-519 prohibits the consideration of a report of an examination of any health care provider unless the report is supported by the testimony of the health care provider. K.S.A. 44-519 goes on to state that the report shall not be considered as competent evidence in any case where the testimony of such health care provider is not admissible. But in certain circumstances, the Kansas legislature has mandated that medical reports shall be considered in workers' compensation litigation, even absent the testimony of the physician. For instance, in K.S.A. 44-510e(a), if there is a dispute between the parties as to the claimant's functional impairment, then the administrative law

judge may appoint an independent health care provider to examine claimant and issue an opinion regarding the employee's functional impairment. This opinion of the health care provider "shall" be considered by the administrative law judge in making the final determination. In that instance, the legislature mandated the testimony of the physician is not required, and the use of the report for the purpose of claimant's functional impairment is not prohibited by K.S.A. 44-519. *See also* McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996). The Appeals Board finds little distinction between a report generated under K.S.A. 44-510e and one generated pursuant to K.S.A. 44-516. Therefore, in applying the ruling in McKinney, the report of Dr. Lucas is admitted without his testimony.

In determining the nature and extent of claimant's injury, the Appeals Board must decide what, if any, functional impairment claimant suffered as a result of the series of microtraumas. Both Dr. Melhorn and Dr. Terrance C. Tisdale, an orthopedic surgeon, had the opportunity to examine and rate claimant. Dr. Melhorn's ratings were confined to the scheduled injuries to the fingers, but these ratings can be converted to whole body ratings through use of the AMA Guides to the Evaluation of Permanent Impairment, using the appropriate conversation charts. Dr. Melhorn's 3.25 percent rating to the little finger under the AMA Guides to the Evaluation of Permanent Impairment is a 2 percent impairment to the hand. His 2 percent impairment to the right hand equates to a 2 percent impairment to the upper extremity, which equals a 1 percent whole body impairment. A 2.4 percent impairment to the hand equals a 2.4 percent impairment to the upper extremity, which equals a 1.4 percent whole body impairment. These combined equate to a 2.4 percent whole body functional impairment. Dr. Tisdale, on the other hand, rated claimant at 9 percent to the body as a whole for claimant's bilateral injuries. Dr. Lucas assessed claimant a 3 percent impairment to each hand, which converts to a 2 percent whole body impairment for each hand, and a combined 4 percent whole body impairment. In considering the medical evidence, the Appeals Board gives equal weight to the opinions of Drs. Melhorn, Tisdale and Lucas, and finds claimant has suffered a 6 percent permanent partial impairment to the body as a whole resulting from the bilateral upper extremity injuries.

Claimant also requests a work disability under K.S.A. 44-510e, which defines the extent of permanent partial disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e goes on to state that:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant terminated his employment with respondent on approximately June 22, 1996. Claimant acknowledged that, after he left his employment with respondent, he did not actively seek employment, but instead spent several months living off the proceeds of his profit sharing that he received from Dillons at the time of his termination. Claimant did ultimately obtain a job with All American Quick Clean, a business owned and run by his current girlfriend, Rhonda Rose. Claimant acknowledged he only worked for All American Quick Clean from September through roughly October 1996. When the business closed in the fall of 1996, claimant did not seek additional employment, but instead continued living off of his Dillons' funds. Claimant also acknowledged receiving some support from Ms. Rose. Claimant was living with Ms. Rose at the time of his February 1997 deposition.

At the time of claimant's termination with Dillons, claimant was under no medical restrictions which would prohibit him from doing that work. Dr. Melhorn acknowledged he had returned claimant to work at his regular duties. In addition, it was respondent's policy to accommodate their employees' medical restrictions, and return them to work as soon as possible. It saved the store money if they were able to accommodate an injured employee by putting them back to work. But claimant never requested accommodation.

In considering claimant's request for work disability, the Appeals Board must consider the policies set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proper job that the worker had the ability to perform. In this instance, the respondent contends it would have accommodated claimant's medical restrictions. In addition, at the time of claimant's termination, he was under no restrictions which would prohibit him from working as a night stocker. While claimant alleges his termination resulted from pain, the various and numerous witnesses provided by respondent tell a different story. Claimant's termination of employment was intended for the purpose of starting up a new business. While claimant denies this allegation, there are many credible witnesses testifying to that fact, and the Appeals Board finds claimant terminated his employment with respondent for the purpose of going into a different line of work, and not due to any ongoing physical limitations. The Appeals Board further finds that claimant had the ability to perform work with respondent which would have paid claimant a comparable wage. Therefore, in applying the principles of Foulk, the Appeals Board finds claimant should be imputed a wage comparable to that which he was earning at the time of his

injury, and under Foulk claimant is not eligible for any work disability. Therefore, claimant is limited to his functional impairment of 6 percent to the body as a whole.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 20, 1998, should be, and is hereby, modified, and an award is granted in favor of the claimant, Gary L. Wiley, and against the respondent, Dillons Companies, Inc., a qualified self-insured, for injuries suffered through March 11, 1996, and based upon a stipulated average weekly wage of $454.73, for a 6 percent permanent partial disability to the body as a whole.

Claimant is entitled to 2.86 weeks temporary total disability compensation at the rate of $303.17 per week totaling $866.72, followed by 13 weeks permanent partial disability compensation at the rate of $303.17 per week totaling $3,941.21, followed thereafter by 11.9 weeks permanent partial disability compensation at the increased rate effective July 1, 1996, of $326.00 per week totaling $3,879.40, for a total award of $8,687.33.

As of the date of this Award, the entire amount is due and owing in one lump sum minus any amounts previously paid.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical benefits will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's contract for attorney fees is approved insofar as it does not violate the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

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| Ireland Court Reporting, Inc. | |
| Transcript of Regular Hearing | $265.90 |
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| Patty L. Morton | |
| Deposition of Gary Lynn Wiley | $132.70 |
| Deposition of Susan Schleiger | $ 56.10 |
| Deposition of Michelle Morgan | $ 83.60 |
| Deposition of J. Mark Melhorn, M.D. | $139.94 |

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| Deposition of Larry Bonewell | $ 99.54 |
| Deposition of Bill Copeland | $ 76.44 |
| Deposition of C. D. England | $ 73.14 |
| Deposition of Randy Burnett | $ 40.14 |
| Deposition of Gary Lynn Wiley | $106.75 |
| Deposition of Rhonda Rose | $106.75 |
| Barbara J. Terrell & Associates | |
| Deposition of Larry Bonewell | $ 91.50 |
| Deposition of Rich Rothe | $ 84.50 |
| Deposition of Rick Mawby | $ 87.00 |
| Deposition of Daryl E. Miller | $ 71.00 |
| Owens, Brake, Cowan & Associates | |
| Deposition of Terrance C. Tisdale, M.D. | $269.30 |

**IT IS SO ORDERED.**

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Scott J. Mann, Hutchinson, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director